

Apr 03, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES for the use of
MARK A. MORGAN, doing business
as Morgan Industries Paving and
Landscaping,

Plaintiff,

v.

HARRY JOHNSON PLUMBING &
EXCAVATION INC., a Washington
corporation; COBURN
CONTRACTORS, LLC, an Alabama
limited liability company, HARTFORD
FIRE INSURANCE COMPANY, a
Connecticut company; and
NATIONWIDE MUTUAL
INSURANCE COMPANY, an Ohio
company,

Defendants.

No. 4:18-cv-05158-SMJ

**ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT**

Before the Court, without oral argument, is Defendants Harry Johnson Plumbing & Excavation, Inc. (“HJPE”), Hartford Fire Insurance Company, (“Hartford”) and Nationwide Mutual Insurance Company’s (“Nationwide”) (collectively, “Defendants”) Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56, ECF No. 56. Plaintiff Mark A. Morgan, doing business as Morgan

1 Industries Paving and Landscaping, opposes the motion. ECF No. 60. Having
2 reviewed the pleadings and the file in this matter, the Court is fully informed and
3 grants the motion.

4 **BACKGROUND**

5 Plaintiff alleges that in 2016, the United States of America, through the
6 Department of Veterans Affairs and Coburn Contractors, LLC (“Coburn”), entered
7 into a written contract, whereby Coburn agreed to furnish certain labor and materials
8 and perform certain work in connection with the replacement of the water system at
9 the Jonathan M. Wainwright VA Medical Center (“VA Medical Center Project”).
10 ECF No. 19 at 4. Coburn, as principle and Hartford, as surety, executed and
11 delivered a Labor and Material Payment Bond to assure payment of the claims of
12 all persons supplying labor and materials in connection with this contract, as
13 required by the Miller Act. *Id.* at 8.

14 Coburn then entered into a subcontract with HJPE in which HJPE agreed to
15 provide certain labor, materials, and services to Coburn in connection with the VA
16 Medical Center Project. *Id.* at 4. HJPE then entered into a sub-subcontract with
17 Plaintiff, whereby Plaintiff agreed to provide certain labor, materials, and services
18 to HJPE in connection with the VA Medical Center Project. *Id.*

19 The parties dispute exactly when Plaintiff’s work on the VA Medical Center
20 Project was substantially completed under the contract terms and also when it was

1 entirely completed. Defendants assert Plaintiff stopped its work on the VA Medical
2 Center Project in March 2017, at which time Plaintiff ceased operating the sole
3 proprietorship and established a limited liability corporation, M Industries, LLC,
4 which performed the subsequent work under the contract. ECF No. 56 at 5.
5 Defendants also assert Plaintiff did not assign the sub-subcontract to M Industries,
6 LLC. *Id.* Plaintiff does not argue that the contract was ever assigned from Mark A.
7 Morgan to M Industries, LLC but argues M Industries, LLC is a continuation of
8 Mark A. Morgan d/b/a Morgan Industries Paving and Landscaping. ECF No. 60 at
9 5. Plaintiff asserts this continuation renders these claims timely under the Miller Act
10 and the contract terms. *Id.*

11 Throughout the work on the VA Medical Center Project, Plaintiff allegedly
12 encountered frequent unforeseen underground site conditions that required labor,
13 materials, and expenses beyond the scope of the sub-subcontract. ECF No. 19 at 5.
14 HJPE and Coburn also allegedly directed Plaintiff to perform additional work
15 beyond the scope of the sub-subcontract. *Id.* Plaintiff asserts HJPE refused to pay
16 Plaintiff in full for the labor, materials, and services provided. *Id.* Plaintiff allegedly
17 gave notice to Coburn and Hartford of its claim to payment on the bond under the
18 Miller Act but that Coburn and Hartford refused to pay any part of that amount. *Id.*
19 at 8–9.

20 On September 25, 2018, Morgan filed a complaint. ECF No. 1. On

1 November 21, 2018, Morgan filed a second amended complaint naming Defendants
2 and Coburn. ECF No. 19. Plaintiff asserts claims for breach of contract, quantum
3 meruit, and unjust enrichment against HJPE; Miller Act Payment Bond against
4 Hartford as surety for Coburn; and Payment Bond against Nationwide as surety for
5 HJPE. *Id.* On January 3, 2019, the Court dismissed Coburn as a defendant because
6 Plaintiff did not assert any cause of action against Coburn. ECF No. 27. Defendants
7 now move for summary judgment. ECF No. 56.

8 **LEGAL STANDARD**

9 A party is entitled to summary judgment where the documentary evidence
10 produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby,*
11 *Inc.*, 477 U.S. 242, 250 (1986). The court must grant summary judgment if “the
12 movant shows that there is no genuine dispute as to any material fact and the movant
13 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “A material issue
14 of fact is one that affects the outcome of the litigation and requires a trial to resolve
15 the parties’ differing versions of the truth.” *SEC v. Seaboard Corp.*, 677 F.2d 1301,
16 1306 (9th Cir. 1982).

17 The moving party has the initial burden of showing no reasonable trier of fact
18 could find other than for the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317,
19 325 (1986). Once the moving party meets its burden, the nonmoving party must
20 point to specific facts establishing a genuine dispute of material fact for trial.

1 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986).

2 The court must view the facts and draw inferences in the manner most
3 favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Chaffin v. United*
4 *States*, 176 F.3d 1208, 1213 (9th Cir. 1999). And the court “must not grant summary
5 judgment based on [its] determination that one set of facts is more believable than
6 another.” *Nelson v. City of Davis*, 571 F.3d 924, 929 (9th Cir. 2009).

7 “[A] mere ‘scintilla’ of evidence will be insufficient to defeat a properly
8 supported motion for summary judgment; instead, the nonmoving party must
9 introduce some ‘significant probative evidence tending to support th[at party’s
10 case].’” *Fazio v. City & County of San Francisco*, 125 F.3d 1328, 1331 (9th
11 Cir. 1997) (quoting *Anderson*, 477 U.S. at 249, 252). If the nonmoving party fails to
12 make such a showing for any of the elements essential to its case as to which it would
13 have the burden of proof at trial, the court should grant the summary judgment
14 motion. *Celotex*, 477 U.S. at 322.

15 **DISCUSSION**

16 Defendants move for summary judgment on Plaintiff’s claim under the Miller
17 Act, which protects subcontractors supplying materials or labor for federal projects,
18 and on Plaintiff’s breach of contract and implied contract claims. ECF No. 56
19 at 2–3. Defendants argue that Plaintiff failed to satisfy mandatory statutory
20 requirements under the Miller Act, that Plaintiff failed to commence suit for state

1 law claims within 90 days of when the work was substantially complete as required
2 by the subcontract, and that Plaintiff may not assert implied contract claims because
3 Plaintiff had an express contract with HJPE. *Id.*

4 Defendants' first two assertions are grounded in Defendants' claim that in
5 March 2017, Plaintiff ceased operation of the sole proprietorship, Morgan
6 Industries Paving and Landscaping, and began operating the limited liability
7 corporation M Industries, LLC. *Id.* at 2–3. Plaintiff asserts that M Industries, LLC
8 was a continuation of Mark A. Morgan d/b/a Morgan Industries Paving and
9 Landscaping under Washington Law. ECF No. 60 at 4. Plaintiff argues that M
10 Industries, LLC's continued work on the VA Medical Center Project, with HJPE's
11 knowledge of the change, through July 2018 establishes a that Plaintiff has met the
12 time limitations under both the Miller Act and the breach of contract claims. *Id.*
13 at 5–8.

14 **A. Plaintiff has not met the contractual time requirements to bring a breach**
15 **of contract claim and cannot bring implied contract claims because there**
16 **is an express contract.**

17 Plaintiff brings a claim for breach of contract, unjust enrichment, and
18 quantum meruit against HJPE. Defendants argue Plaintiff's breach of contract claim
19 is untimely pursuant to time limitations set forth in the contract and that Plaintiff
20 cannot bring implied contract claims because the parties had an express contract.
ECF No. 56 at 3. In response, Plaintiff does not argue that the implied contract

1 claims can survive and puts forth only one argument as to why the breach of contract
2 claim is timely. ECF No. 60 at 8. Specifically, Plaintiff argues that because Morgan
3 Industries Paving and Landscaping's work continued through July 2018, the
4 September 2018 filing of this suit was timely. *Id.*

5 Summary judgment on a contract claim is proper "if the written contract,
6 viewed in light of the parties' objective manifestations, has only one reasonable
7 meaning." *Wm. Dickson Co. v. Pierce County*, 116 P.3d 409, 413 (Wash. Ct.
8 App. 2005). "Washington follows the objective manifestation theory of contract
9 interpretation, under which courts attempt to ascertain the intent of the parties 'by
10 focusing on the objective manifestations of the agreement, rather than on the
11 unexpressed subjective intent of the parties.'" *William G. Hulbert, Jr. and Clare*
12 *Mumford Hulbert Revocable Living Trust v. Port of Everett*, 245 P.3d 779, 784
13 (Wash. Ct. App. 2011) (quoting *Hearst Comm'ns, Inc. v. Seattle Times*, 115
14 P.3d 262, 267 (Wash. 2005)). "Interpretations giving lawful effect to all the
15 provisions in a contract are favored over those that render some of the language
16 meaningless or ineffective." *Grey v. Leach*, 244 P.3d 970 (Wash. Ct. App. 2010).

17 The contract states, "Subcontractor must file and serve a Summons and
18 Complaint, Counterclaim or Third-Party Complaint (or demand for arbitration
19 when applicable) against Contractor within 90 days of Substantial Completion.
20 Actions for nonpayment of retainage must be filed and served within 45 days after

1 payment by Owner to Contractor or within 90 days after Substantial Completion,
2 whichever is longer. Compliance with the obligations in this paragraph is an
3 absolute condition precedent to maintaining an action in arbitration or court.” ECF
4 No. 56-3 at 45. Substantial completion is defined as “the state of completion when
5 the improvement upon real property may be used or occupied for its intended use.”
6 *Id.* at 32.

7 Plaintiff argues that the evidence of continued performance under the
8 contract through July 11, 2018 “precludes a finding of ‘Substantial Completion’ as
9 defined in the second-tier subcontract.” ECF No. 60-1 at 3. However, the operative
10 question according to the plain language of the contract is not whether the work was
11 entirely complete and no additional work was needed, but rather whether the
12 improvement could be used or occupied for its intended use. *See* ECF No. 56-3
13 at 32. Indeed, Defendants correctly note that the contract terms reference
14 anticipated additional work after substantial completion and before final
15 completion. *See* ECF No. 63 at 11 (citing ECF No. 56-3 at 45).

16 Defendants point to evidence, in the form of Plaintiff’s own expert reports,
17 that work was substantially complete in late January 2018. ECF No. 56-1 at 4 (citing
18 ECF No. 52-2 at 18); ECF No. 63 at 10 (citing ECF No. 61-3 at 19). The evidence
19 Plaintiff cites to shows nothing more than that *some* work was completed after
20 January 2018. ECF No. 60-1 at 3 (citing payroll from March 2018 and July 2018).

1 Plaintiff provides no evidence of an alternative substantial completion date. Plaintiff
2 also fails to articulate a legal argument concerning why evidence of *some* work
3 completed after January 2018 supports a finding of a later date of substantial
4 completion, particularly given that the contract explicitly contemplated *some* work
5 after substantial completion. Plaintiff has accordingly failed to provide “significant
6 probative evidence tending to support” Plaintiff’s case. *See Fazio*, 125 F.3d at 1331.
7 As such, the Court finds that the date of substantial completion could not have been
8 later than January 2018 and Plaintiff’s September 2018 filing of this action for
9 breach of contract was not timely under the plain language of the contract.¹

10 Plaintiff’s claims for unjust enrichment and quantum meruit are implied
11 contract claims. A party to a valid express contract is bound by the provisions of
12 that contract and may not bring an action on an implied contract related to the same
13 matter in contravention of that express contract. *Chandler v. Washington Toll*
14 *Bridge Auth.*, 137 P.2d 97 (1943). As such, summary judgment in favor of HPJE is
15 granted as to these claims.

16 **B. Plaintiff may not bring claims for work performed by M Industries, LLC**
17 **under the Miller Act**
18

19 ¹ Because the Court finds that the substantial completion date could not have been
20 later than January 2018, the Court does not address the effect of performance by
M Industries, LLC, rather than Mark A. Morgan d/b/a Morgan Industries Paving
and Landscaping, after March 2017.

1 Plaintiff has one claim under the Miller Act against Hartford as Coburn's
2 surety. ECF No. 19 at 8–9. Defendant argues Plaintiff has no legal basis to bring a
3 Miller Act claim because the Mark A. Morgan d/b/a Morgan Industries Paving and
4 Landscaping ceased performance in March 2017, after which performance was
5 completed by M Industries, LLC d/b/a Morgan Industries Paving and Landscaping.
6 ECF No. 56 at 9–10. Plaintiff argues M Industries, LLC is a continuation of Mark
7 A. Morgan d/b/a Morgan Industries Paving and Landscaping, and as such,
8 continued work by M Industries, LLC through July 2018 makes the notice and filing
9 timely. ECF No. 60 at 7.

10 The Miller Act's purpose is "to protect persons supplying materials and labor
11 for federal projects, and it is to be construed liberally in their favor to effectuate this
12 purpose." *Avanti Constructors, Inc.*, 750 F.2d at 761. "[I]t is well-established that
13 'the obligation of a surety on a bond furnished under the Miller Act must be
14 determined by federal law.'" *United States ex rel. IBM v. Hartford Fire Ins. Co.*,
15 112 F. Supp. 2d 1023, 1030 (D. Haw. 2000) (quoting *American Auto Insurance Co.*
16 *v. United States ex rel. Luce*, 269 F.2d 406, 408 (1st Cir. 1959)).

17 To establish a prima facie case under the Miller Act, 40 U.S.C. § 3131 *et seq.*,
18 a labor or material supplier must allege and prove (1) the labor or materials were
19 supplied in prosecution of the work provided in the contract; (2) the supplier has
20 not been paid; (3) the supplier has a good faith belief that the labor or materials were

1 intended for the specified work; and (4) the jurisdictional requisites have been met.
2 *United States ex rel. Martin Steel Constructors, Inc. v. Avanti Constructors, Inc.*,
3 750 F.2d 759, 761 (9th Cir. 1984).

4 The jurisdictional requirement refers to meeting the statute's time limitations
5 on notice and filing. *See United States ex rel. Hawaiian Rock Prods. Corp. v. A.E.*
6 *Lopez Enters.*, 74 F.3d 972, 975 (9th Cir. 1996) (finding Miller Act jurisdictional
7 requirements met by timely notice and filing). Specifically, if the claimant does not
8 have a direct contractual relationship with the contractor furnishing the bond, then
9 the claimant must give written notice to the contractor within ninety days "from the
10 date on which the person did or performed the last of the labor or furnished or
11 supplied the last of the material for which the claim is made." 40 U.S.C.
12 § 3133(b)(2). The case also must be brought "no later than one year after the day
13 on which the last of the labor was performed of material was supplied by the person
14 bringing the action." *Id.* § 3133(b)(4).

15 Defendants argue Plaintiff has not met the fourth jurisdictional requirement
16 for a Miller Act Claim. Plaintiff argues summary judgment is inappropriate because
17 it is "disputed that in March 2017, Morgan ceased operations on the project," and
18 this factual controversy requires decision by a jury. ECF No. 60 at 5. Contrary to
19 Plaintiff's argument, the issue of whether continued work by *M Industries, LLC*,
20 rather than by Plaintiff *Mark A. Morgan d/b/a Morgan Industries Paving and*

1 *Landscaping*, is sufficient to meet the limitations imposed by the statute is a legal
2 issue, not a factual dispute. As such, resolution is appropriate on a motion for
3 summary judgment.

4 Further, the only evidence Plaintiff points to in support of this assertion are
5 payroll reports and timecards from April and July 2018 under the name Morgan
6 Industries Paving and Landscaping and Morgan Ind. Paving, Excavation, and
7 Landscaping. ECF No. 60-1 at 3. M Industries, LLC's license became effective
8 March 10, 2017. ECF No. 56-3 at 4. Plaintiff also canceled the license for the sole
9 proprietorship, Mark A. Morgan d/b/a Morgan Industries Paving and Landscaping,
10 in March of 2017. *Id.* In a deposition Plaintiff also stated that in March 2017,
11 Morgan Industries Paving and Landscaping became a d/b/a of M Industries, LLC.
12 *Id.* at 14. Plaintiff presents no evidence to dispute these facts, only arguing that M
13 Industries, LLC was a continuation of Mark A. Morgan's sole proprietorship. ECF
14 No. 60 at 4-5. However, Plaintiff relies on a case applying an exception to the
15 general rule under Washington law that a corporation purchasing the assets of
16 another corporation does not become liable for the debts and liabilities of the selling
17 corporation. *See id.* (citing *Columbia State Bank v. Invicta Law Grp. PLLC*, 402
18 P.3d 330, 338 (Wash. Ct. App. 2017)). This rule is to protect bona fide purchasers
19 who lack notice of claims against the property, and the exception is to hold liable
20 purchasers that "are merely a new hat for the seller." *Columbia State Bank*, 402

1 P.3d at 320. Neither this case nor the cases on which it relies support the premise
2 that a successor enterprise retains the potential legal claims of the prior entity. As
3 such Plaintiff, a distinct legal entity from M Industries, LLC, has not shown it can
4 bring suit for work performed by M Industries, LLC.

5 Plaintiff also notes that “Miller Act case law on equitable tolling of the statute
6 of limitations may be instructive.” ECF No. 60 at 6. “In order to assert successfully
7 the doctrine of equitable estoppel, a plaintiff must show that the defendant’s conduct
8 was so misleading as to have caused the plaintiff’s failure to file suit.” *Atkins v.*
9 *Union Pac. R. Co.*, 753 F.2d 776, 777 (9th Cir. 1985)); *see also United States ex*
10 *rel. EC Power Sys. Elec. Contrs. Co. v. Ins. Co. of the State of Pa.*, Case No. C15-
11 5326 BHS, 2016 WL 1436136, at *5 (W.D. Wash. Apr. 12, 2016). Plaintiff argues
12 that “HJPE is well aware that Morgan continued operations on the project to the
13 benefit of both Morgan and HJPE” and that “it is contradictory for HJPE to on one
14 hand accept the benefit of the labor from Morgan after the entity transition and then
15 to assert that Morgan did not work on the project after March 2017.” *Id.* Plaintiff
16 has presented no evidence of HJPE engaging in misleading conduct, no less
17 evidence of how such conduct resulted in Plaintiff failing to file suit. For example,
18 Plaintiff does not present any evidence of when HJPE became aware that M
19 Industries, LLC rather than Plaintiff, was performing under the contract. As such,
20 Plaintiff has not shown that equitable estoppel should apply.

1 It is neither clear why Plaintiff did not attempt to assign the contract to M
2 Industries, LLC after canceling the license for the sole proprietorship nor why this
3 action was filed solely under the name of Plaintiff's sole proprietorship that ceased
4 operations in March 2017. It is clear, however, that Plaintiff Mark A. Morgan d/b/a
5 Morgan Industries Paving and Landscaping ceased operations in March 2017 and
6 cannot meet the Miller Act's limitations period based on the time of notice and
7 filing. As such, Plaintiffs Miller Act claim must be dismissed.

8 Accordingly, **IT IS HEREBY ORDERED:**

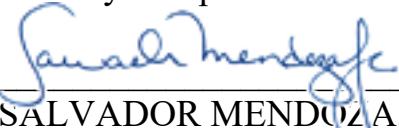
9 **1.** Defendants' Motion for Summary Judgment Pursuant to Fed. R. 56,
10 **ECF No. 56, is GRANTED.**

11 **2.** Plaintiff's claims for breach of contract against HJPE, quantum meruit
12 against HJPE, unjust enrichment against HJPE, and under the Miller
13 Act against Hartford are **DISMISSED WITH PREJUDICE.**

14 **3.** The Clerk's Office is **DIRECTED** to enter judgment in favor of
15 Defendants HJPE and Hartford.

16 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and
17 provide copies to all counsel.

18 **DATED** this 3rd day of April 2020.

19 
20 **SALVADOR MENDOZA, JR.**
United States District Judge